T H E A D V O C A T E

A Monthly Newsletter for Military Defense Counsel

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The Advocate is an unofficial newsletter for military defense counsel. It will highlight recent cases which might not otherwise be brought to your attention, discuss new approaches in criminal law, and deal with practical problems. Future issues will include guidelines for the Article 38c brief, the role of the defense counsel at a military lineup, Article 32 investigations, and other topics of interest.

It is hoped that this newsletter will be of assistance to defense counsel, and that it will foster a spirit of cohesiveness among the "defense bar." However, it must be remembered that any views expressed are personal to the Chief, Defense Appellate Division and do not necessarily represent those of The Judge Advocate General or the Department of the Army.

Comments and contributions are welcome.

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SENTENCE AND PUNISHMENT--MAY THE DEFENSE COUNSEL AFFIRMATIVELY ARGUE FOR A DISCHARGE?

It is often a tempting defense tactic to ask the court to discharge a client, but not to confine him at length. This removes counsel from the awkward position of arguing for retention of the recidivist absentee or the heinous offender, and by conceding the appropriateness of one type of punishment, increases the chances for a reduction of another. May this be done?

It depends. The Court of Military Appeals recently held (United States v. Garcia, 18 USCMA 75, 39 CMR 75 (1968)), that such an argument is improper where the record did not affirmatively show that the accused desired such a discharge. The Court applied the rationale of United States v. Mitchell, 16 USCMA 302, 36 CMR 458 (1966), and United States v. Mella, 17 USCMA 122, 37 CMR 386 (1967), and found that the defense counsel was acting contrary to the interests of his client when he argues for a discharge. Virtually the same result was reached in United States v. Richardson, 18 USCMA 52, 39 CMR 52 (1968) in a per curiam decision.

These cases do not, however, solve the problem. Clearly if a client wants to be retained, argument may not be made for a punitive discharge. But what if a client wants out?

The Court of Military Appeals has not yet considered this question, but the Boards of Review have. In CM 419383, Martinez, (26 December 1968) the accused, at an out-of-court hearing, requested that his counsel argue for a punitive discharge. The law officer ascertained on the record that the accused understood the effect of a punitive discharge, and permitted the defense counsel to argue for it. The defense asked for, and received, a bad conduct discharge and a period of confinement considerably less than the maximum. The Board of Review approved this procedure without opinion.

In CM 419750, Smith, 27 January 1969, the accused similarly requested his counsel to argue for a punitive discharge and the law officer explained the effect of such a discharge to the accused at an out-of-court hearing. The Board was again satisfied that the accused understood what he was asking his counsel to do, and approved the procedure. In this case, however, the counsel conceded too much, because he suggested that an appropriate punishment would be a "punitive discharge." This included a dishonorable discharge, the Board said, and thus prejudiced the accused. The Board reduced the dishonorable discharge to a bad conduct discharge.

The lessons for defense counsel are clear:

a. If a client does not want a discharge, or is equivocal about it, do not argue for it.

b. If a client does want a discharge, explain the adverse consequences to him carefully before trial.

c. If counsel intends to argue for a discharge, inform the law officer and the trial counsel in advance, and request an out-of-court hearing where the accused's wishes are spread on the record.

d. It appears that an argument should not be made for a dishonorable discharge no matter what the circumstances.

e. Even if all of the above is done, the Court of Military Appeals may still find such an argument improper. Every time the issue has been presented to the Court of Military Appeals, the Court has held against such arguments. What the Court would do with a case where the record shows an affirmative request from the accused and a detailed explanation of the consequences of a punitive discharge by the law officer is, of course, anybody's guess.

PUTTING DEMEANOR IN THE RECORD--AN APPROACH

Cases may sometimes be won or lost not by the testimony of witnesses and the instructions of judges, but by their facial expressions, their demeanor, and their physical gestures. What does the defense counsel do in the heat of the battle when his case is being subverted by a scowling judge or a fist-pounding court member?

A practical yet effective approach to the problem has been suggested in Conner, The Trial Judge, His Facial Expressions, Gestures and General Demeanor--Their Effect on the Administration of Justice, Am. Crim L.Q. 175 (Summer 1968). He suggests that the facial expressions and gestures of the trial judge can never appear in the record unless the trial lawyer makes them a part of it. And if it is not in the record, it is generally not appealable. The following course of action has been recommended:

(1) The moment an incident occurs, ask for a side-bar conference and explain to the law officer that you want an out-of-court hearing so that a proper record may be made. If your request is denied, this in itself may be an appealable issue.

(2) At the out-of-court hearing, dictate into the record in minute detail a description of what took place. Describe facial expressions and gestures.

(3) Make a motion for a mistrial at this time.

Conner notes that it is also wise to make a notation of the names of everybody present in the court. In an aggravated case, a hearing should be requested on the motion for a mistrial, and those present in court as witnesses should be called to testify in support of the motion. This will, of course, necessitate a short continuance to interview witnesses, but reasonable requests in this regard will likely be honored.

It might also be helpful, in advance of trial, to ask the reporter to record not only words, but outbursts of table-thumping and the like. In United States v. Burse, 16 USCMA 62, 36 CMR 218 (1966) a notation in the record that the president hit his fist against the court table after a remark helped the Court of Military Appeals appreciate the atmosphere which existed in the court room.

In short, there is a way to enhance the record to reflect accurately what happened at trial and to preserve an error for appeal. It is up to defense counsel to use it in an appropriate case.

POST-TRIAL DUTIES OF THE DEFENSE COUNSEL

Post-trial Interview

The trial defense counsel's duty to his client does not end with the conclusion of the trial. One crucial area of obligation, often overlooked in the post-trial commotion is the post-trial interview. In many commands, this interview is conducted on the day of trial; in others it takes place some time later. The trial defense counsel can play a big role in this proceeding if he chooses to.

Foremost is the duty to prepare one's client for the interview. This preparation should preferably begin before trial. The trial defense counsel should note during his preparation for extenuation and mitigation favorable evidence which might be appropriate during a post-trial interview but which might not be appropriate for trial itself. The client should be advised to highlight this evidence during the interview.

Secondly, the client should be advised by his defense counsel exactly what the post-trial interview is, and how it can work to his advantage and disadvantage. He should be advised that his demeanor and military bearing as well as his desire to be restored to duty are often of paramount importance. Counsel should insure that his client presents a good image.

Finally, the counsel should decide whether his client might need the assistance of counsel during the interview, and in the appropriate case, a request should be made to the interviewer that counsel accompany the client. There is no case on record holding that there is a right to counsel during the interview, but it is hard to see why the traditional Article 31 rights and the right to counsel should not apply here as well.

Staff Judge Advocate's Post-trial Review

The post-trial review is also an integral step in the appellate process and the trial defense counsel's duties reach it as well. As the Court of Military Appeals has noted, the post-trial review and the action of the convening authority represent "an integral first step in an accused's climb up the appellate ladder. . . . It is while the case is at the convening authority level that the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence." United States v. Wilson, 9 USCMA 223, 26 CMR 3 (1958).

Reviews are often closely scrutinized on appeal, see e.g., CM 416162, Thomas, ___CMR___(2 January 1968), but a new review will not normally be ordered unless there is a reasonable chance that the convening authority was misled. CM 416637, Ward, 7 December 1967.

Often a review will omit "boilerplate" sections referring to the convening authority's powers and duties. It is obviously in the accused's interest to have these correctly stated; the trial defense counsel should bring such deficiencies to the staff judge advocate's attention, and if that is fruitless, the information may be passed on to the convening authority in the form of a written rebuttal, a clemency petition or attached to the record in an Article 38c brief.

If adverse matters are presented in the review, the accused should be offered an opportunity to rebut or explain them. CM 419222, Keith, ___CMR___(20 December 1968). Paragraph 85b of the 1969 Manual affords the accused this right unless the adverse matters were supplied by the accused himself or he is charged with knowledge that the information might be used against him. This section is untested, however, and there appears to be nothing to preclude the accused from attempting to explain or rebut on his own motion. In any event, the explanation may properly be made the subject of an Article 38c brief. This revision of the Manual once again illustrates how important thorough preparation for the post-trial interview is, and how essential is the assistance of counsel at this stage of review.

To sum up, the trial defense counsel should:

a. Prepare his client for the post-trial interview and in appropriate cases ask to be present;

b. Scrutinize the post-trial review carefully, if possible;

c. Correct errors of fact or "boilerplate" errors either by (1) negotiation with the staff judge advocate or (2) written rebuttal, or (3) a clemency petition;

d. If prevented from accomplishing any of the above, make the facts and circumstances part of an Article 38c brief.

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

SPEEDY TRIAL -- The D.C. Court of Appeals has held that a delay by police officers in making an arrest which renders it impossible for the accused to remember and account for his whereabouts at the time of the crime is chargeable against the government for speedy trial purposes. This rule, normally applied in narcotics cases, was applied here in a robbery conviction. Jones v. United States, 402 F.2d 639 (D.C. Cir. 1968).

TRIAL--CROSS-EXAMINATION -- It is improper, says the Sixth Circuit, to ask the accused on cross-examination if he participated in unrelated criminal conduct not resulting in a conviction. The error cannot be purged by a limiting instruction, and a mistrial should have been granted. United States v. Rudolph, 403 F.2d 805 (6th Cir. 1968).

LINEUPS--RIGHT TO COUNSEL -- When is a lineup not a lineup? When it is on-the-scene and occurs within minutes of the crime. The D.C. Court of Appeals held that in this case "countervailing policy considerations" make Wade's right to counsel inapplicable. Apparently the identifying witness would be inherently more reliable at a contemporaneous identification than at one conducted a week or two after the crime. But the court must still apply due process to the facts to see if the "lineup" was unduly suggestive. Russell v. United States, ___F.2d___ (D.C. Cir. 24 January 1969).

POST-TRIAL INTERVIEW -- It is improper for the trial defense counsel to conduct the post-trial interview. The interviewer represents the convening authority and his interests would be "opposed to his former client." Query: Is the post-trial interview then an adversary proceeding? CM 419358, Owens, 10 December 1968.

AUTHENTICATION OF RECORD -- The record of trial must be authenticated before the convening authority's action. CM 419053, Maher, 18 December 1968.

SPEEDY TRIAL -- Pretrial incarceration on a special court-martial sentence might be chargeable to the government on a speedy trial motion if the confinement was in anticipation of the accused's possible trial on the second offense, according to the Board of Review, but since the Board found a denial of speedy trial even discounting that time, the issue was not faced squarely. CM 419008, Banks, 5 December 1968.

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